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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 706

SANGAMON VALLEY TELEVISION CORPORATION
and
STATE OF ILLINOIS, *Petitioners,*

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, SIGNAL HILL TELECASTING CORPORATION, ILLIANA TELECASTING CORPORATION, AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., PLAINS TELEVISION CORPORATION, and METROMEDIA, INC., *Respondents.*

JOINT PETITION BY SANGAMON VALLEY TELEVISION CORPORATION AND THE STATE OF ILLINOIS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

D. M. PATRICK
STANLEY S. HARRIS
JAY E. RICKS
800 Colorado Building
Washington 5, D. C.
Attorneys for Petitioner Sangamon Valley Television Corporation

WILLIAM G. CLARK,
Attorney General,

M. BROOKS BYUS,
Assistant Attorney General,
State of Illinois
Supreme Court Building
Springfield, Illinois
Attorneys for Petitioner State of Illinois

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OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit has not yet been reported officially, and is printed as an appendix hereto.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1963. A petition for rehearing en banc filed by Sangamon Valley Television Corporation was denied on September 25, 1963; a petition for rehearing en banc by the State of Illinois was denied on November 6, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Federal Communications Commission violated Section 307(b) of the Communications Act, and acted arbitrarily and capriciously, in adopting (for the second time) an order which deleted the only VHF television channel from Springfield, Illinois and reassigned it to St. Louis, Missouri, and Terre Haute, Indiana.

STATUTE INVOLVED

This case involves Section 307(b) of the Communications Act,[1] which provides as follows:

> "In considering applications for licenses, and modifications and renewals thereof: when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

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[1] Act of June 19, 1934, c. 652, § 307(b), 48 Stat. 1084, as amended by Act of June 5, 1936, c. 5, § 2, 49 Stat. 1475, 47 U.S.C. § 307(b).

STATEMENT OF THE CASE

Petitioners challenge the validity of a report and order of the Federal Communications Commission which was adopted on July 18, 1962. (J.A. 303-332.) Because of the somewhat unique procedural situation which existed at the lower appellate level, a preliminary explanation thereof may be of assistance to the Court.

Three separate and distinct petitions were filed in the court of appeals for review of the Commission action here involved. In Case No. 17,380, co-petitioner Sangamon Valley Television Corporation (the applicant for the use of VHF television Channel 2 in Springfield, Illinois) sought reversal of the deletion of Channel 2 from Springfield and its reassignment to St. Louis, Missouri, and Terre Haute, Indiana. Co-petitioner State of Illinois intervened in that case, taking essentially the same position as Sangamon Valley.[2] In Case No. 17,356, 220 Television, Inc. (the licensee of a television station operating on a previously assigned VHF channel in St. Louis) challenged the addition of another VHF station to St. Louis.[3] In

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[2] Sangamon Valley Television Corporation first filed its petition for review in the United States Court of Appeals for the Seventh Circuit. On motion by the Federal Communications Commission, that court exercised its discretion and transferred the case to the United States Court of Appeals for the District of Columbia Circuit (notwithstanding pleadings in opposition to such a transfer by Sangamon Valley and the State of Illinois).

[3] There are only three national television networks, and respondent Signal Hill's St. Louis station is affiliated with respondent ABC's (American Broadcasting-Paramount Theatres, Inc.) network. Thus, the addition of Channel 2 to St. Louis left 220 Television without a network, and it has sustained more than $1,000,000 in operating losses since going on the air in April of 1959. (J.A. 181.)

Case No. 17,279, Fort Harrison Telecasting Corporation (a would-be applicant for Channel 2 in Terre Haute) took issue with the Commission's refusal to accept new applications for the facility when it again reallocated Channel 2 to Terre Haute.

Although the parties thus raised essentially different questions, they consented to a consolidation of the cases for the convenience of the court of appeals. The majority opinion of the court of appeals makes clear the differing positions of the parties below (note the sections headed by Roman numerals in the lower court's opinion); that court affirmed (by a vote of 2-1) the reallocation of Channel 2 and unanimously reversed the Commission's refusal to accept new applications for Channel 2 in Terre Haute. The dissent was limited to the reallocation of Channel 2; Circuit Judge Wright took the position that there was an "obvious" violation of Section 307(b). He also stated that such action was arbitrary and capricious. (Appendix, p. 21a.)

The present co-petitioners are interested only in the deletion of Channel 2 from Springfield, with its concurrent reassignment to St. Louis and Terre Haute. Sangamon Valley Television Corporation and the State of Illinois participated below only in Case No. 17,380; they did not intervene in or take any position with respect to Cases No. 17,279 and 17,356.

The majority and dissenting opinions below set forth many of the relevant facts, and needless repetition here will be avoided. However, partly because the decision of the court of appeals omits certain critical facts, and partly because the action of the Commission constitutes essentially a repetition of similar action dealt

with by this Court earlier in the history of this lengthy case, the following supplemental information is included within this statement of the case:

The Federal Communications Commission made its first allocation of television channels on June 27, 1945. It then assigned VHF (very high frequency) television channels to more than 100 of the largest metropolitan areas of the country. Springfield, the centrally located capital of the nation's fourth most populous state, was assigned two VHF channels.[4] Because television then was largely an unknown quantity, no one sought authority to operate on those channels prior to September of 1948, when the Commission adopted a "freeze" on the granting of television authorizations pending a study of nationwide allocation problems.[5]

Co-petitioner Sangamon Valley Television Corporation applied for the use of a VHF channel in Springfield while the freeze was pending. The freeze was lifted when the Commission adopted its so-called Sixth Report and Order on April 11, 1952.[6] In that action the Commission shifted many of the prior VHF channel assignments to meet certain mileage separation standards, and, for the first time, allocated UHF (ultra high frequency) channels throughout the country. In the Sixth Report and Order, the Commission concluded that it "should disperse both VHF and UHF widely among states and communities."[7] The assign-

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[4] 10 FED. REG. 12267, 12269 (1945).

[5] 13 FED. REG. 5182 (1948).

[6] 1 PIKE & FISCHER RADIO REG. 91:601-1112.

[7] *Id.* at 91:663.

ment of only VHF channels or only UHF channels to particular communities was rejected as contrary to the public interest. Since VHF stations even then were recognized as being able to cover considerably larger areas than UHF stations, making it desirable to allocate VHF channels to broad areas of common interest, "the 12 VHF channels were distributed as broadly as possible."[8] The Sixth Report and Order made the following channel assignments to the states and communities here involved (1960 census figures also are given):

	1960 Population	No. of VHF Channels	No. of UHF Channels
Springfield	83,271	1	2
State of Illinois	10,081,158	11	50
St. Louis	750,026	4	3
State of Missouri	4,319,813	17	38
Terre Haute	72,500	1	2
State of Indiana	4,662,498	7	41

As the Court is generally aware, the vastly more desirable VHF channels became the subjects of multiple applications and comparative hearings, while the inferior UHF channels were virtually unwanted and were available for the asking.[9] While co-petitioner Sangamon Valley Television Corporation was engaged in a comparative hearing for the use of Channel 2 in Springfield, respondent Plains Television Corporation placed a UHF station on the air in that city in 1953.

[8] *Id.* at 91 :621.

[9] As early as 1958, before the differences between VHF and UHF were as well known as they are today, the court of appeals succinctly recognized VHF channels to be "superior" and UHF channels to be "inferior." *WIRL Television Co.* v. *United States*, 253 F.2d 863, 866 (D.C. Cir.), *vacated*, 358 U.S. 51 (1958).

It remains Springfield's only television station today. While two of St. Louis' VHF channels were tied up in comparative hearings, respondent Signal Hill Telecasting Corporation obtained a quick grant and placed a UHF station on the air to serve that city.

As the VHF comparative hearings neared their conclusions, some UHF operators such as respondents Signal Hill and Plains took steps to insulate themselves from the VHF competition which they had anticipated when they voluntarily obtained unopposed UHF grants. The term "deintermixture" was coined to connote the possible deletion of single VHF channels from a few selected communities to protect the competitive positions of UHF operators in those communities.

Springfield was among the small number of communities to be considered for deintermixture, and the Commission invited the submission of written comments with respect to the possible reallocation of Channel 2 to St. Louis in a proceeding separate from the comparative hearing in which Sangamon Valley was a party. On February 26, 1957, the Commission adopted a report and order in Docket No. 11747 amending its 1952 table of assignments by reallocating Channel 2 from Springfield to St. Louis and Terre Haute.[10] The Commission simultaneously reallocated respondent Signal Hill's UHF Channel 36 from St. Louis to Springfield—although Signal Hill had made no re-

[10] 22 F.C.C. 318 (1957). Terre Haute was an afterthought; the Commission originally proposed to move Springfield's Channel 2 only to St. Louis.

quest for such action on the record.[11] The move of Signal Hill's channel thus paved the way for that party to be simultaneously awarded the right to operate on Channel 2 in St. Louis; for the first and only time in the history of television the sole VHF channel assigned to a major city (Springfield) was deleted and given to an existing UHF operator (Signal Hill) in another city (St. Louis).

Some time later, the Interstate and Foreign Commerce Committee of the House of Representatives formed a Subcommittee on Legislative Oversight which investigated a number of television cases. Testimony before that subcommittee revealed that while the proceeding involving the possible reallocation of Channel 2 was pendente lite, the president of Signal Hill made an extraordinary series of ex parte ap-

[11] One point should be clearly understood. Respondents repeatedly have referred to the "substitution" of two UHF channels for the single VHF channel in Springfield. This is purely a smokescreen; virtually any number of UHF channels can be assigned to Springfield irrespective of where Channel 2 is assigned—but this does not mean that anyone will operate on them. Economic factors, rather than words, control; Springfield has had three UHF *channels* since 1957 but only one *station*. Sangamon Valley and the State of Illinois repeatedly have advised the Commission of their conviction that Springfield never will have more than one UHF station (due essentially to VHF signals originating elsewhere which can be received in the area and to the difficulty in having a UHF station receive a network affiliation); such contentions have been ignored by the Commission but have been proven correct by the passage of time. Excluding Channel 2, on the date of the latest reallocation (July 18, 1962) all of the VHF channels assigned to the states of Illinois, Missouri, and Indiana were in use. However, only ten of Illinois' 53 UHF channels were in use, only two of Missouri's 37 UHF channels were in use, and only 11 of Indiana's 48 UHF channels were in use. 63 ed.). (Some changes in UHF assignments were made between 1952 and 1962.)

proaches to every member of the Commission in his successful effort to have the channel moved to St. Louis for Signal Hill's benefit.[12]

On July 3, 1957, Sangamon Valley, then still unaware of the improper ex parte activities of respondent Signal Hill, filed a petition for review of the reallocation of Channel 2 in the United States Court of Appeals for the District of Columbia Circuit. That court, also then uninformed as to Signal Hill's ex parte conduct, subsequently adopted a cursory per curiam opinion in which it concluded, on the basis of the substantially different then-existing record, that it was "unable to sustain" Sangamon Valley's contention that the reallocation violated Section 307(b) of the Communications Act.[13]

Sangamon Valley then petitioned this Court for a writ of certiorari, asserting that the Commission and the court of appeals had failed to give proper effect to the requirement of Section 307(b) of the Communications Act as construed and applied by this Court in *Federal Radio Comm'n* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266 (1933), and *FCC* v. *Allentown Broadcasting Corp.*, 349 U.S. 358 (1955). In opposing that petition, the United States and the Commission felt obliged "to call the Court's attention" to the fact that it appeared that extensive ex parte approaches

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[12] In addition to arguing the merits of the case repeatedly off the record to each of the Commissioners individually "'in privacy in their offices,'" the president of Signal Hill "had every Commissioner at one time or another as his luncheon guest, and . . . he gave turkeys to every Commissioner in 1955 and in 1956." *Sangamon Valley Television Corp.* v. *United States*, 269 F.2d 221, 223-24 (D.C. Cir. 1959).

[13] *Sangamon Valley Television Corp.* v. *United States*, 255 F.2d 191, 192 (D.C. Cir. 1958).

had been made to Commissioners while the case had been pending before the agency. This Court granted Sangamon Valley's petition for a writ of certiorari, vacated the judgment of the court of appeals, and remanded the case to the court of appeals "for such action as it may deem appropriate." [14]

After receiving briefs and oral argument on the significance of the facts as to Signal Hill's ex parte influence which had been developed by the Subcommittee on Legislative Oversight, the court of appeals on May 8, 1959 vacated the reallocation of Channel 2 because of that respondent's "private approaches to the members of the Commission" and remanded the proceeding to the agency for an evidentiary hearing.[15] That hearing revealed a vastly more aggravated pattern of ex parte influence on behalf of Signal Hill than had been revealed to the Subcommittee on Legislative Oversight, yet the Commission—half of whose remaining members had been among those subjected to Signal Hill's prior ex parte blandishments—proposed no more than to permit other parties to reply on the record to what was discovered to have been done by Signal Hill off the record.[16] This proposed procedure was

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[14] *Sangamon Valley Television Corp.* v. *United States*, 358 U.S. 49-50 (1958).

[15] *Sangamon Valley Television Corp.* v. *United States*, *supra* n. 12, 269 F.2d at 224.

[16] Not surprisingly, the Commission in proposing such a procedure was silent as to how other parties could rebut such of Signal Hill's prior activities as the entertainment of Commissioners at luncheons, at the theatre, and at the home of Signal Hill's president, could rebut gifts of turkeys to Commissioners and stockings to their secretaries, and could rebut scores of personal visits by Signal Hill's president to Commissioners in their offices, the latter of which included both oral and written ex parte representations on the merits of the proceeding.

objected to by Sangamon Valley and the Department of Justice, and was rejected after briefs and oral argument by the court of appeals on July 27, 1961.[17] The court then made it clear to the Commission that future decisions as to the ultimate location of Channel 2 could be based only upon an untainted record made in an "entirely new proceeding." [18]

The supposedly new proceeding which is now before this Court was instituted by a notice of proposed rule making which was adopted on September 7, 1961. (J.A. 6-7.) Comments and reply comments were filed on December 4, 1961 and January 11, 1962, respectively. Although the prior reallocation of Channel 2 had been vacated as a result of successive actions by this Court and the court of appeals, Signal Hill continued to utilize the frequency in St. Louis on a "temporary" basis during this entire period.

The only parties supporting the reallocation of Channel 2 were private parties with direct financial interests in the ultimate location of the channel. (This is stated as a fact, not to imply any impropriety thereby.) Never has the City of St. Louis, the State of Missouri, the City of Terre Haute, or the State of Indiana expressed any interest in or need for Channel 2. Conversely, the State of Illinois repeatedly has asserted its interest in and need for a wide coverage VHF television station in its centrally located capital city.

One fact alone demonstrates the vital importance of this case to the State of Illinois. Springfield is the

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[17] *Sangamon Valley Television Corp.* v. *United States*, 294 F.2d 742 (D.C. Cir. 1961).

[18] *Id.* at 743.

seat of the Illinois Government, and the site of various courts, the State Fair, and numerous events which are of major educational, civic, political, and historical interest and significance to the people of the State of Illinois. (J.A. 147-50.) A Channel 2 station in Springfield would furnish a television signal of Grade B or better intensity to 1,174,017 people in an area of 15,286 square miles. A UHF station in Springfield can furnish a Grade B or better signal to only 467,888 people in an area of only 6,212 square miles—less than half the coverage of a VHF facility. (J.A. 165, 174, 176.)

On July 18, 1962, the Commission again deleted Springfield's only VHF channel and again gave it to respondent Signal Hill for its continued use in St. Louis.[19] Since the channel also can be fitted into Terre Haute once it is taken out of Springfield, that Indiana city—smaller than Springfield and not the state capital—acquired its second VHF channel. St. Louis thus received its fifth VHF channel at the expense of the only one previously allocated to the capital of Illinois; Missouri, with a population less than half that of Illinois, thus received its 18th VHF channel leaving Illinois with but ten.

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[19] The majority opinion of the court of appeals states: "We note also that the membership of the Commission which rendered the 1962 decision was substantially different from the membership participating in the 1957 decision." (Appendix, p. 11a.) Such a statement, we respectfully suggest, is misleading. Of the six Commissioners who voted in 1962 to move Channel 2 again, three had been subjected to substantial ex parte influence by Signal Hill prior to voting for such a result in 1957. We do not consider this to be a "substantially different" membership, particularly since a different result in 1962 would have constituted an implied acknowledgment that the 1957 action had indeed been brought about by improper influence.

The petition for review which gave rise to the 2-1 affirmance of the reallocation of Channel 2 by the court of appeals was predicated jurisdictionally on Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(a), which incorporates by reference the Judicial Review Act of 1950, as amended, 5 U.S.C. § 1031 *et seq.*

REASONS FOR ALLOWANCE OF THE WRIT

The action of the Commission and the affirmance thereof by the court of appeals are violative of Section 307(b) of the Communications Act and in conflict with applicable decisions of this Court in the following multiple particulars:

(1) The reallocation of Channel 2 was taken for the purpose of enhancing the competitive positions of individual station operators, and wholly without regard for the needs for Channel 2 of the respective communities and states involved.

(2) The agency and appellate actions now before the Court deal only in terms of the communities and totally disregard even the existence of the states involved, thus not only circumventing but effectively amending a valid statutory provision.

(3) The reallocation of Channel 2 was taken in the face of express Congressional disapproval of the concept of "deintermixture."

(4) The prior reallocation of Channel 2, although legally vacated by this Court and the court of appeals because of the improper ex parte influence which led to the reallocation originally, formed the principal basis for the second reallocation despite a clear directive that the entire matter be considered anew.

(5) The reallocation of Channel 2, unless reversed by this Court, will leave the people of the State of Illinois forever without a vitally needed wide coverage television station in their centrally located state capital.

ARGUMENT IN SUPPORT OF ALLOWANCE OF THE WRIT

It is axiomatic that administrative agencies normally have broad discretion in the exercise of their rule making powers, and the allocation of television channels normally is a rule making function. In enacting the Communications Act of 1934 (and its predecessor, the Radio Act of 1927), however, Congress recognized that a statutory limitation had to be placed on the discretion of the agency in allocating broadcasting frequencies to avoid possible discrimination against any state or community. Thus, Section 307(b) of the Communications Act (like its predecessor Section 9 of the Radio Act[20]) was enacted to *require* that broadcast facilities be distributed fairly, efficiently, and equitably among the several states and communities.

As Judge Wright stated in his dissent below: "This language of Section 307(b) means what it says." (Appendix, p. 17a.) This was stressed by this Court in the analogous *Allentown* case. There, applicants from the respective cities of Easton and Allentown in Pennsylvania each sought a radio frequency which only one could have. Allentown had three radio stations, while Easton had but one. Although Allentown was several times larger than Easton, the Commission ruled that Easton's need for a second station was greater than Allentown's need for a fourth. On this

[20] 44 Stat. 1166 (1927).

basis alone the Easton application was granted. The court of appeals disagreed, taking the position that a Section 307(b) determination is merely one of the elements to be considered in deciding which of two communities should receive a broadcast facility that only one can have.[21] This Court reversed the court of appeals, holding that Section 307(b) requires the Commission to determine first, without regard for any other considerations, which of two competing communities has the greater need for the facility in question.[22]

This concept had been recognized by the Commission after this Court construed the statutory predecessor of Section 307(b) in *Federal Radio Comm'n* v. *Nelson Bros. Bond & Mortgage Co., supra*, 289 U.S. 266 (1933). There, an applicant sought a new radio station in Gary, Indiana, and applied for a frequency which was in use by an existing station in Chicago. Based upon the more precise system of evaluating frequencies which was then in existence, Illinois had more than its fair and equitable share of frequencies, while Indiana had less. The Commission accordingly took the facility away from the existing Illinois station and awarded it to the Indiana applicant. This Court affirmed that result, saying:

> "In making its 'fair and equitable allocations,' the Commission was entitled and required to consider all the broadcasting facilities assigned to the respective states, *and all the advantages there-*

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[21] *Allentown Broadcasting Corp.* v. *FCC*, 222 F.2d 781 (D.C. Cir. 1954).

[22] *FCC* v. *Allentown Broadcasting Corp., supra*, 349 U.S. 358 (1955).

> *by enjoyed,* and to determine whether, in view of all the circumstances of distribution, a more equitable adjustment would be effected * * *." 289 U.S. at 281-282 (emphasis added).

The Court further said:

> "The concern of the Congress was with the interests of the people,—that they might have a reasonable equality of opportunity in radio transmission and reception, and this involved an equitable distribution not only as between zones but as between states as well." 289 U.S. at 283.

Until the instant case, there was little mystery to this concept. In adopting its Sixth Report and Order in 1952, the Commission readily recognized that the substantial superiority of VHF over UHF required a fair and equitable distribution of VHF channels. Thus, it was a "basic element in the Commission's assignment plan . . . that large cities should [not] receive an undue share of the relatively scarce VHF channels . . . ."[23]

How, then, did the Commission seek to justify in light of Section 307(b) its deletion of Springfield's only VHF channel to give St. Louis its fifth? The answer is that it did not. Since any consideration of relative community and state needs could lead to only one answer, the Commission ignored relative needs in a cursory reference to Section 307(b). (J.A. 328-29.) Instead, it talked in terms of how desirable it would be to make multiple UHF channels available to Springfield so that the capital theoretically could have a number of competitively equal facilities. (See footnote 11, *supra.*) After first appearing to decide (com-

[23] 1 PIKE & FISCHER RADIO REG. at 91:621.

pletely speculatively, that Springfield would be better off without Channel 2, the Commission then euphemistically says, in effect, as long as we are removing Channel 2 from the Illinois capital, let's put it in St. Louis. (J.A. 320-21.)

This approach is both illusory and illegal. Nowhere in the Communications Act is there any provision for competitive equality within a given market, and all relevant authority has rejected the idea that the public interest can be subordinated to the private economic interests of station operators. As this Court made clear in the *Sanders* case:

> "Plainly it is not the purpose of the Act to protect a licensee against competition but to protect the public. Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other other broadcasters to survive or succumb according to his ability to make his programs attractive to the public."[24]

When the Commission first deleted Channel 2 from Springfield in 1957, it sought to justify such action by contending—with no record support—that the city would soon have additional UHF stations.[25] As noted, time has proven the error of such a claim; today Springfield has only the single UHF station which it has had for ten years. It is the public's right to service which is protected by Section 307(b), not the competitive position of a private station operator, and

> ". . . it is not incumbent upon the Commission to evaluate the probable economic results of every

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[24] *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940).

[25] 22 F.C.C. at 327.

> license grant. Of course the public is not concerned with whether it gets service from A or from B or from both combined. The public interest is not disturbed if A is destroyed by B, so long as B renders the required service."[26]

The deletion of Channel 2 from Springfield means that many thousands of southern Illinois residents will never be able to receive Illinois-originated public affairs, educational, political, news, and discussion television programming; they will continue to be dependent for television service on VHF programming from St. Louis and Terre Haute. Indeed, the Commission's decision acknowledges that 716,687 residents *of Illinois* are within the Grade B contour of Signal Hill's Channel 2 station in St. Louis. (J.A. 324-25.) In the entire majority decision below, *not one word* is devoted to the interests or needs of the states involved; it is as though the word "states" is not contained in Section 307(b). This is the situation which so far departs from the clear intent of the statute as to cry out for correction by this Court. The majority, mesmerized by the Commission's tedious decision and speculative assertion that Springfield will be better off without Channel 2, has effected a de facto amendment of Section 307(b) by totally ignoring the need of the State of Illinois for a wide coverage television facility in its capital. The following language in the majority opinion below is illuminating:

> "We do not read *Allentown* as requiring that the relative needs of two communities for television transmission service be determined solely on the basis of the need for *VHF* service. Nor has any

[26] *Carroll Broadcasting Co. v. FCC*, 258 F.2d 440, 444 (D.C. Cir. 1958).

decision to that effect been cited to us." (Appendix, p. 7a.)

If the statute were concerned only with communities, as the court was, the court's reading of *Allentown* might have some validity. But the statute requires a fair and equitable distribution of frequencies among the several states as well as among communities, and we here ask this Court to supply a decision to that effect so that the Commission and the court of appeals will not similarly err in the future.

In testifying before a Congressional Committee while the latest proceeding was pending before the Commission, the then-Chairman of the FCC freely acknowledged that competitive equality is the goal of deintermixture. He stated:

> "The general problem of deintermixture is to try to make, by deleting a V and substituting a U—is to try to make it competitively equal for all the broadcasters in that area. That is the general theory. And also to provide a choice of service to the viewer. That is the purpose of deintermixture."[27]

Perhaps some benefit could accrue to certain communities to have competitive equality within them (although we vigorously deny that such is the case with respect to Springfield). If the Commission believes this to be a desirable objective, however, it should ask Congress to amend the Communications Act, for as Section 307(b) is now written the Commis-

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[27] *Hearings on All-Channel Television Receivers and Deintermixture before the House Committee on Interstate and Foreign Commerce*, 87th Cong., 2d Sess. 189 (1962) [hereinafter *All-Channel Hearings*].

sion may not ignore and discriminate against a *state's* obvious need for a frequency simply by claiming that it thus can enhance the competitive climate in a given *community*. As this Court stressed in reversing an action of the Civil Aeronautics Board for that agency's failure to follow one of its statutory mandates, "the fact is that the Board is entirely a creature of Congress and the determinative question is not what the Board thinks it should do but what Congress has said it can do."[28]

When the Commission's former chairman testified as to the basically competitive objective of deintermixture, he was supporting legislation which would require all television sets to be manufactured so as to be capable of receiving UHF as well as VHF signals. At that time, the Commission was considering approximately ten deintermixture cases. Although Congress naturally has favored the development of UHF, Congress quickly made apparent its strong opposition to the concept of deintermixture because of the inevitable loss of service which deintermixture causes. In response to Congressional inquiries the Commission submitted a written statement on March 16, 1962 in which it specifically rejected "selective deintermixture as a general or long-range solution for the television allocations problem."[29]

In response to overwhelming Congressional demand, the Commission promised a moratorium on deintermixture in exchange for the enactment of all-channel receiver legislation.[30] However, the Commission subse-

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[28] *CAB* v. *Delta Air Lines, Inc.*, 367 U.S. 316, 325 (1961).

[29] *All-Channel Hearings*, *supra* n. 27, at 195.

[30] *Id.* at 195-98.

quently proceeded to advise Congress that in the pending Springfield deintermixture case, the application of a moratorium would upset the status quo rather than preserving it.[31] This stemmed solely from the fact that Channel 2 had been in "temporary" use in St. Louis since 1957 pursuant to the tainted decision which had been vacated by successive actions by this Court and the court of appeals. In the House and Senate Reports on the all-channel bill, both legislative bodies stressed their opposition to deintermixture.[32] The Senate Committee referred in its report to the Commission's reluctance to apply a moratorium to three cases—including this one—and stressed:

> "In deciding these cases, however, your committee expects the FCC to give weight to the Congressional policies set forth in this report, and specifically, to any loss of service to the public which would result in the abandonment of VHF channels allocated to the particular communities involved in these cases."[33]

Notwithstanding all of the foregoing, the Commission promptly thereafter returned Channel 2 to Signal Hill in St. Louis, thus depriving more than 700,000 people of Grade B or better television transmission service from the Illinois capital.[34] The Commission

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[31] *All-Channel Hearings*, *supra* n. 28, at 209.

[32] S. Rep. No. 1526, 87th Cong., 2d Sess. 1-7 (1962); H.R. Rep. No. 1559, 87th Cong., 2d Sess. 1-9 (1962).

[33] S. Rep. No. 1526, *supra* n. 32, at 6-7. The House Report (No. 1559, *supra* n. 32) contained essentially the same statement at pp. 7-8.

[34] To repeat, a Channel 2 station in Springfield would furnish Grade B or better service to 1,174,017 people in an area of 15,286 square miles; a UHF station there can furnish Grade B or better service to only 467,888 people in an area of only 6,212 square miles. (J.A. 165, 174, 176.)

opinion makes it apparent that the agency paid no heed to the prior appellate vacating of the improperly influenced first reallocation. In effect, the Commission was not considering whether to delete Springfield's only VHF channel; it was considering whether it should move to St. Louis' fifth VHF channel to the Illinois capital—precisely the opposite of the actual procedural situation involved.

Thus, the Commission speaks of the "proposed introduction of a *second* VHF competitive service" in the Springfield area, rather than in terms of deleting the Illinois capital's only VHF assignment.[35]. (J.A. 314.) The Commission relied on the fact that no one has been able to operate on Channel 2 at Springfield to conclude that the deletion of the channel "would not deprive anyone of an existing service." (J.A. 315.) It stated that since Signal Hill already was using Channel 2 in St. Louis, "there would have to be strong countering public interest considerations to lead to a conclusion to use Channel 2 at Springfield at this time." (J.A. 320.) It stated that putting Channel 2 in Springfield—where it was legally assigned—would constitute "dislocating action to worsen the competitive situation." (J.A. 320.) And, in ultimately deciding the case, the Commission said: "The competitive service provided by [Signal Hill's] station

[35] The Commission's acknowledgment that the use of Channel 2 in Springfield would result in a second competitive VHF service in the area illustrates the disingenuousness of its concurrent claim that the deletion of Channel 2 makes the area all-UHF. The Springfield area is not all-UHF from the standpoint of television reception (J.A. 175); for example, the VHF station in Champaign, Illinois has a larger audience in Springfield than does the local UHF station. And, ironically, some people in Springfield now can watch Channel 2 programs—but they come from St. Louis rather than from their own city. (J.A. 170-71.)

KTVI [on Channel 2 in St. Louis] for the last five years in the area would also, it is apparent, create a great void if deleted." (J.A. 324.) The equities thus built up by a proven wrong-doer, coupled with what might best be described as administrative inertia (the tendency of an agency to reinstate a prior action however wrong or invalid that action may have been), thus proved below to have been insuperable obstacles to those who, like Judge Wright, have believed that Section 307(b) means what it says.[36]

CONCLUSION

Sangamon Valley and the State of Illinois agree with the dissenting judge that this case,

> ". . . in all its ramifications, demonstrates the bankruptcy of the F. C. C.'s program for assigning VHF and UHF television channels pursuant to Section 307(b) of the Communications Act of 1934. It also shows what an administrative mess can result when improper influence is brought to bear on the individual members of the Commission in connection with making these assignments." (Appendix, p. 17a.)

In concerning itself solely with competitive considerations, the Commission did not even make a pretense of comparing the needs of Springfield and the

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[36] The lower court majority was troubled by the Commission's obvious reliance on the fact that Channel 2 was in use in St. Louis, and stated that "where cities are competing for channel allocations, a temporary allocation to one city rather than another should not operate to create vested rights." (Appendix, p. 14a.) The court resolved its doubts in favor of the Commission, however, because of its belief that the Commission's action was "adequately buttressed by the other grounds on which it relied." (*Ibid.*) This, we submit, was further error; agency action must be judged on the basis of the reasons given by the agency for its action. *SEC* v. *Chenery Corp.*, 318 U.S. 80, 94 (1943).

State of Illinois with the needs of St. Louis and the State of Missouri for Channel 2. It thus violated Section 307(b) of the Communications Act and the decisions of this Court construing the statutory requirement. In affirming such action, the majority of the court of appeals not only sanctioned the agency's obvious error, but compounded it by wholly ignoring the interests of the states involved, thus judicially removing the word "states" from the controlling statute.

This case epitomizes the reason for being of Section 307(b). The need of the State of Illinois for a VHF station in its centrally located state capital is urgent, and that public need has been unlawfully suppressed to date for the benefit of private interests. In light of all of the foregoing considerations, it is prayed that the instant petition for a writ of certiorari be granted.

Respectfully submitted,

D. M. PATRICK
STANLEY S. HARRIS
JAY E. RICKS
800 Colorado Building
Washington 5, D. C.

Attorneys for Petitioner
Sangamon Valley
Television Corporation

WILLIAM G. CLARK,
Attorney General,

M. BROOKS BYUS,
Assistant Attorney General,
State of Illinois
Supreme Court Building
Springfield, Illinois

Attorneys for Petitioner
State of Illinois

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